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90-1698

No.

In The

Supreme Court of the United States

October Term, 1990

ABRAHAM RODOLITZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Was the petitioner deprived of his day in court on appeal when the Court of Appeals declined to reach the merits of the case on an intangible fraud theory, which was later overturned by this Court in McNally v. United States, 483 US 350 (1987)?

2. Does information -- not in the nature of a trade secret -- about the ownership of companies that supplied repair materials in this case constitute "property" within the meaning of the mail fraud statute as interpreted by McNally and cases following McNally?

3. Where the question of guilt or innocence hinged on whether the petitioner was trying defraud an insurance company or

whether he was only trying to get what he was entitled to under an insurance policy, could there have been a fair trial when the jury instructions told the jury, in essence, not to determine how much the defendant was entitled to recover under the insurance policy?

4. Where the petitioner was convicted of tampering with a witness for "misrepresenting" to the witness that he was only trying to get "proper value" from the insurance company, could the conviction stand when the jury was charged that it should not determine what the proper value was under the insurance policy?

5. Was the petitioner's challenge to the insurance law charge properly preserved by a general objection to the insurance law instruction, when his attempt to make the

grounds of the objection more specific was peremptorily cut off by the trial judge?

6. Is coram nobis an appropriate remedy in this case, where the sentence has been served and where the rationale for the Court of Appeal's affirmance of the conviction was undermined by a subsequent retroactive decision by the Supreme Court of the United States?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Abraham Rodolitz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 4, 1991.

Opinions Below

The opinion of the Court of Appeals affirming the denial of coram nobis is in the form of a summary order not to be published in the Federal Reporter. A copy is set forth in the appendix to this petition.

The opinion of the District Court denying the coram nobis petition was delivered orally by Hon. John E. Sprizzo. A copy of the minutes with his opinion is set forth in the appendix to this petition.

The opinion of the Court of Appeals on the direct appeal is reported at 786 F.2d 77 (2d Cir. 1986). A copy is also set forth in the appendix to this brief.

Jurisdiction

The certiorari jurisdiction of this Court is invoked under 28 USC 1254.

The order of the District Court denying coram nobis is dated July 5, 1990.

The order of affirmance by the Court of Appeals is dated February 4, 1991.

This petition is filed within 90 days of the order of the Court of Appeals.

Statement of the Case

a) Procedural history

This petition is from a summary order of the United States Court of Appeals for the Second Circuit, decided February 4, 1991, affirming an order of the United States District Court for the Southern District of New York (Hon. John E. Sprizzo), entered July 5, 1990 (89 Civ. 1935 (JES)), denying a Petition for Coram Nobis pursuant to 28 USC 1651.

The petitioner was indicted on October 26, 1984 (S 83 CR 805 (JES)) for conspiracy (18 USC 371) (count 1); mail fraud (18 USC 1341) (counts 2,3,4,5) and tampering with a witness (18 USC 1512(a)) (count 6).

Jury trial began on November 29, 1984, before Hon. John E. Sprizzo, D.J. At the close of the government's case in chief count 1 was dismissed by the Court. The government elected not to proceed on count 4.

On December 13, 1984 the petitioner was found guilty of 3 mail fraud counts (2,3,5) and tampering with a witness (count 6).

On March 27, 1985 the Court sentenced Rodolitz to concurrent 2-year terms on each count, and imposed fines of $1000 on each mail fraud count and $250,000 on the witness tampering count, thus aggregating $253,000 in fines.

The petitioner was free on bail pending appeal. On March 17, 1986, the conviction was affirmed by the United States Court of Appeals for the Second Circuit. United States v. Rodolitz, 786 F.2d 77 (2d Cir. 1986). (Opinion reproduced in appendix).

Petition for rehearing and rehearing en banc was denied on May 15, 1986.

Petitioner began serving his two year sentence on July 1, 1986.

Subsequently, a petition for writ of certiorari was denied by the Supreme Court on October 6, 1986. 107 S.Ct. 102 (1986).

On December 3, 1987, following the decision of the Supreme Court of the United States in McNally v. United States, 483 US 350 (1987), petitioner filed a motion in the United States Court of Appeals for the Second Circuit for recall of the mandate and for leave to file a further petition for

rehearing. The motion was denied on January 4, 1988.

Petitioner completed service of his sentence in July, 1988. The petition for Coram Nobis was filed on March 7, 1989.

b) Grounds for Coram Nobis

This coram nobis petition was prompted by the decision of the Supreme Court of the United States in McNally v. United States, 483 US 350 (1987)..

Simply put, McNally undermined the rationale of the Court of Appeal's opinion affirming the mail fraud conviction in this case.

Specifically, the jury convicted the defendant under a tangible fraud instruction. On appeal to the Second Circuit, the major point raised was that the charge of the district court improperly applied New York insurance law so as to

enable the jury to find a fraud where there actually was none. In affirming, the Court of Appeals declined to reach the charge point on the merits, because it found sufficient proof of an intangible fraud "inherent in the circuitous and deceptive means of substantiating the insurance claim, rather than simply in the amount recovered." United States v. Rodolitz, 786 F.2d 77 at 83, supra. This rationale, however, was undermined by McNally, which overruled the line of cases dealing with intangible frauds.

Thus, petitioner never received his day in court on the appeal. His major point addressed to the trial proceedings was never reviewed on the merits. He is therefore entitled to have the jury instruction issue - and the reliability of the guilty verdict - reconsidered on its merits.

Indeed, review on the merits at this late date is still appropriate because McNally has been held retroactive to cases such as this one, where the appeal was decided before McNally. Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988); United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988).

On this coram nobis proceding, the District Court opinion held that in his view McNally and the cases following it "do not outlaw all theories of mail fraud based upon intangible rights," and in this case, the information withheld from the insurance company is itself a "commercial right...having pecuniary value."

On appeal, petitioner contested this, arguing that the information withheld was not property -- such as a trade secret -- under the mail fraud statute as interpreted by McNally and cases following McNally.

Nevertheless, the Court of Appeals once again declined to review the jury instruction on the merits. Instead, it held that the insurance point was not properly preserved. However, this is clearly an incorrect ruling. As we demonstrate in Point V, infra, the defense first generally objected to the charge on New York insurance law and when in the act of stating more specific grounds for the objection, counsel was cut off by the trial judge, peremptorily and prematurely. Under these circumstances, the point was preserved for review.

c) The Trial

In brief, the evidence showed as follows. On Saturday, October 9, 1976, a windstorm swept through the Bronx and wrecked the roof of a warehouse in the Oaks Point section. During the storm, the whole

roof was "moving" and a third of it was lifted clean off its foundation.

The warehouse, Oak Point Industrial Park, was owned by the petitioner, Abe Rodolitz, a 65-year-old self-made man, with warehouses and a construction business in various parts of the city. Oak Point was four city blocks square, and the roof measured 400,000 square feet. It was rented to Alexanders Department Stores and inside were millions of dollars worth of merchandise belonging to Alexanders. Winter was coming on, and if the roof weren't quickly repaired the damage from the elements would surely be enormous. Rodolitz rapidly assembled the necessary materials, men and know-how, and set about replacing the damaged roof, ultimately completing the project by the middle of February, 1977.

The building was insured by Massachusetts Bay Insurance Company. The

policy, dating from 1973, insured the building for its actual cash value up to $3,800,000. (Insurance policy reproduced in appendix).

Petitioner computed his loss at $1,248,000. The insurance company established a cash reserve of $250,000 for the repair, but offered Rodolitz only $30,000. This disparity led to a lawsuit in May,1977. In Queens County Supreme Court, a jury found for Rodolitz, assessing recovery under the insurance policy at the $1.2 million figure.

Massachusetts Bay did not give up. After a post-verdict settlement conference called by the insurance company failed to produce an agreement, the case somehow came to the U.S. Attorney's Office for the Southern District of New York. With the government now championing the insurance company's position that Rodolitz was not

entitled to the insurance money he asked for and the jury awarded, Rodolitz was indicted for mail fraud, conspiracy and obstruction of justice. Basically, the government claimed that the defendant had tried to "rip off" the insurance company, that the cost figures were inflated, that the companies supplying roofing materials for the job were a sham, and that the money Rodolitz paid for the materials went back to him "under the table." The three counts of mail fraud were based on mailings of innocuous legal papers which Rodolitz' attorneys sent during the course of the civil litigation.

At the trial, the defense disputed that Rodolitz tried to rip off the insurance company. Experts, including government witnesses, testified that Rodolitz' estimates for his loss were within proper bounds (e.g. Clarke, Tr.752-63), and there

was no inflation of figures. Rodolitz also properly repaired the roof.

But even if the government's accusation that Rodolitz didn't pay as much for the materials as he represented is accurate, it is also immaterial. He had no obligation to fix the roof at cut-rate prices or even to fix the roof at all, because the cost of repair is totally irrelevant under the insurance policy. As demonstrated in pt. III, infra, out-of-pocket expenses are not a standard under the insurance policy, because the clause relating to them was never invoked, and could not legally be invoked. Yet the court's charge - and the opinion in the Second Circuit as well - mistakenly adopted out-of-pocket expenses as a standard, and allowed the jury to incorrectly use it as a measure of fraud.

What Rodolitz was entitled to recover depended on the actual cash value of the

premises before and after the windstorm. However, the trial court's charge told the jury not to assess actual cash value at all. This is the fatal flaw in this case. How can a jury decide whether a defendant is illegally trying to get more than he is entitled to from an insurance company without first deciding what he was legally entitled to under the policy? Obviously it can't. And this instruction -- upon which hinges the guilt or innocence of the petitioner -- has never been reviewed on its merits on appeal.

REASONS FOR GRANTING THE WRIT

POINT I

BECAUSE THE SUPREME COURT DECISION IN MCNALLY V. UNITED STATES UNDERMINED THE RATIONALE FOR AFFIRMANCE, THE PETITIONER HAS BEEN DEPRIVED OF HIS DAY IN COURT ON THE APPEAL.

In the District Court the petitioner was tried for a "tangible fraud", the government charging that he sought, by fraudulent means, to collect more money from the insurance company than he was entitled to. This was hotly disputed by trial testimony, but under the court's instructions, the jury found a "tangible" fraud of money. On direct appeal to the Court of Appeals, Point I of the brief argued that the district court, by incorrectly applying the New York insurance law, allowed the jury to find the petitioner was trying to get more than he was entitled to under the insurance policy, while in fact

he only asked for what he was entitled to under a correct application of the law.

The opinion of the Court of Appeals did not reach the issue of the soundness of the charge on its merits. United States v. Rodolitz, 786 F.2d 77 (2d Cir. 1986) at p. 83. Instead, the Court determined that the conviction could be upheld under the "intangible" line of fraud cases then considered good law, because it was enough that the defendant intended to deprive the insurance company of relevant information. Any argument about how much money Rodolitz was entitled to recover under his insurance contract was irrelevant. "Because we find the fraud required for mail fraud inherent in the circuitous and deceptive means of substantiating the insurance claim, rather than simply in the amount recovered, defendant was not prejudiced by the court's charge with respect to damages recoverable

under the insurance policy in the state court proceedings and we do not reach the validity of the court's instruction in that regard". ibid. As explained earlier in the opinion, the intangible fraud found sufficient to uphold the conviction was described as follows: "it was not necessary for the government to prove that Rodolitz recovered more from the insurance company than that to which he was entitled. To sustain the conviction, the government needed to prove only that Rodolitz employed a deceptive scheme intending to prevent the insurer from determining for itself fair value of recovery." 786 F.2d at 80-81.

Subsequently, the Supreme Court decided McNally v. United States, 483 US 350 (1987), in which it held that intangible fraud was not encompassed by the mail fraud statute. Only a tangible fraud of money or property was subject to prosecution under the

statute. Thus, in this case, if the information withheld does not constitute money or property, then the rationale for avoiding review of the jury instruction on its merits is completely undermined (see, pt II, infra), and the petitioner has been deprived of his day in court on the appeal.

Indeed, if the Court of Appeals had considered the case on the merits, it would have realized that the charge on New York insurance law was erroneous in a way which directly impacted on the verdict, not only on the mail fraud counts (Pt. III, infra), but also on the tampering count (Pt. IV, infra).

However, when the case once again reached the Second Circuit, this time on the appeal from the denial of coram nobis, the Second Circuit once again declined to reach the merits. This time its excuse was that the objection to the trial court's charge

did not sufficiently preserve the issue. However, this is an incorrect ruling. The question of New York insurance law was broached throughout the trial, both by the defense and by the prosecution, and after the charge defense counsel made a general objection to the instructions on insurance law. When counsel was in the act of making his general objection more specific, he was cut off by the trial judge, who gave him an exception and wished him luck in the Court of Appeals. Under these circumstances, the objection was preserved (see, Pt. V, infra). In addition, the Second Circuit felt that coram nobis relief is not warranted here. We dispute this result as well, since coram nobis is the only available remedy for giving effect to a superceding and retroactive Supreme Court decision, where the sentence has been completed. (see, Pt. VI, infra).

POINT II

UNDER THE FACTS OF THIS CASE, THE INTANGIBLE FRAUD RATIONALE BY WHICH THE COURT OF APPEALS AVOIDED REACHING THE MERITS OF THE JURY INSTRUCTION HAS BEEN UNDERCUT BY MCNALLY V. UNITED STATES AND BY SUBSEQUENT DECISIONS FOLLOWING MCNALLY

The petitioner's conviction for mail fraud grew out of a claim for reimbursement under an insurance policy. In the autumn of 1976 the roof of a Bronx warehouse owned by the petitioner sustained substantial damage from a windstorm. Rodolitz repaired the roof and sought compensation under his insurance policy. Differences over the value of the loss led to a law suit won by the petitioner in a Queens County court. Nevertheless, Rodolitz was prosecuted for mail fraud based on evidence that the materials used in the repair were purchased from companies owned by himself. As the Second Circuit viewed it, "By transferring funds between these accounts, he created an

appearance of 'arm's length' purchases of materials, some or most of which...Rodolitz already owned. Obviously under such an arrangement Rodolitz was in a position to 'purchase' his own materials to repair the roof at whatever price he chose to invoice them to one of his own companies. Based on this evidence, the jury had ample grounds to find that Rodolitz developed and participated in this scheme to succesfully recover more from the insurance company than he was lawfully due." 786 F.2d at 80.

However, it was argued on appeal that the District Court's charge improperly applied New York Insurance Law to allow the jury to find Rodolitz was trying to recover more from the insurance company than he was lawfully due, while, if the insurance law were properly applied, the jury would have seen that he was not trying to recover more than was due. (Appellant's brief on direct

appeal, Docket No. 85-1112, Pt. I; also see, Pt. III, infra). The Circuit Court opinion dodged this argument by finding an "intangible" fraud in the facts of the case, thus rendering the charge on tangible fraud irrelevant. 786 F.2d at 80-1, 83, supra.

However, it is just this "intangible" view of mail fraud - that deceptive means alone are sufficient to convict, without money or property being potentially or actually taken - that was struck down in McNally v. United States, 483 US 350 (1987), as being an improper application of the mail fraud statute. Moreover, other cases following McNally are closer to the facts of this case, and confirm the applicability of McNally to it. e.g. United States v. Slay, 858 F.2d 1310 (8th Cir. 1988); United States v. Regan, 713 F.Supp. 629 (SDNY 1989); United States v. Covino, 837 F.2d 65 (2d Cir. 1988); United States v. Ochs, 842 F.2d

515 (1st Cir. 1988); also see, Carpenter v. United States, 484 US 19 (1987); United States v. Herron, 825 F.2d 50 (5th Cir. 1987); United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987).

The McNally opinion

In McNally the defendants, one of whom was a public official, entered into a corrupt agreement with the State's workmen's compensation insurance agent that in return for continuing the agency relationship with the State, the agent would kickback a portion of its commissions to companies in which the defendants had an interest. The government alleged that the scheme defrauded the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly and that they obtained money "by means of false pretenses

and the concealment of material facts." 107 S.Ct. at 2878.

The Supreme Court held that the mail fraud statute was confined to a deprivation of money or property rights and not of intangible rights, such as the right to have the affairs of government conducted honestly. In McNally the jury was not required to find that the Commonwealth itself was defrauded of money or property. There was no proof that in the absence of the scheme the State would have paid a lower premium or secured better insurance, nor were the kickback monies the property of the State. The premiums would have to be paid anyway; the scheme just directed to whom they would be paid. Moreover, in answering a dissent that it was fraud for the public officer to fail to disclose his financial interest, the majority pointed out that no statute, state or federal, forbade such a

concealment, and "it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law" (107 S.Ct. at 2182, fn.9).

While the specific intangible fraud in McNally is different than the intangible fraud here, the holding is directly applicable. Concealment of information is not mail fraud unless the information itself is money or property or the concealment deprives someone else of money or property. In this case, the District Court felt that the information withheld compromised an intangible right belonging to the insurance company - the "right to conduct an investigation into an insurance claim and not be subject to sham documentation in connection with that claim." But the cases following McNally show that this is not

enough to make "property" under the mail fraud statute. For information to be "property," it has too rise to the level of a trade secret or the like. The "right to conduct an investigation" is clearly not on this level.

Cases following McNally

In United States v. Slay, 858 F.2d 1310 (8th Cir. 1988), defendants concealed their ownership of a company that applied for a cable TV franchise from the city. The issue was whether the concealment of who owned the company deprived the city of a property right, just as in this case, the issue is whether Rodolitz' concealment of his ownership of companies deprives the insurance company of a property right. In deciding that the concealment of ownership interests was not deprivation of the city's property rights, the Circuit Court first discussed Carpenter v. United States, 484 US

19 (1987). In Carpenter, the Supreme Court regarded a Wall Street Journal reporter's stealing of confidential information from his newspaper as a theft of property, because that information belonged exclusively to the newspaper until they chose to publish it. Conversely, in Slay, the court held that the concealment of who owned the cable company did not take any property from the city. To the contrary, "the information which the prosecution labels 'property' was at all times in the possession of the defendants, and the object of their alleged scheme was to withhold, rather than to obtain, this information from the City. Withholding valuable information from the City is not the same thing as depriving the City of its property, and only the latter conduct violates the mail fraud statutes." 858 F.2d at 1316.

Indeed, in United States v. Ochs, 842 F.2d 515 (1st Cir. 1988), the court specifically interpreted Carpenter as limiting information as property only where the information is the equivalent of a trade secret or confidential news information. "Carpenter holds that certain forms of intangible property, like confidential news information or trade secrets, are protected by the mail fraud statute." 842 F.2d at 526. By the same token, the information Rodolitz withheld about his relationship to other companies deprives the insurance company of no property equivalent to a trade secret or confidential news information.

In United States v. Regan, 713 F.Supp. 629 (SDNY 1989) the defendants withheld information from their business partners about sham transactions relating to bogus capital gains and losses. In addition, they deprived a partnership client of information

that affected the amount of money the client would have to pay in taxes. With respect to the mail fraud as against the partners, the court held that the "partners may indeed have had a contractual right to receive truthful information ...but like the right of 'the citizens and government of Kentucky to have the Commonwealth's affairs conducted honestly', this right creates no property interest in the information allegedly withheld from them." 713 F.2d at 636. Similarly, with respect to defrauding the client, "defendants may have defrauded Mattel of an intangible right to accurate information regarding Drexel's holdings of Mattel securities, but this does not properly allege a deprivation of a property interest." 713 F.2d at 638.

Thus, while the information concealed had pecuniary value, it was still not property. It certainly did not rise to the

level of a trade secret, so as to make Carpenter applicable. Therefore, if the information in Regan is not a property right, neither is the information withheld in the instant case. It may in some indirect way have pecuniary value, but it is not the sort of property right contemplated by the mail fraud statute or McNally. To put it bluntly, "a right to honest and faithful performance of contractual obligations is not property for purposes of the mail and wire fraud statutes." United States v. Regan, 713 F.2d at 636, supra; Carpenter v. United States, 108 S.Ct. at 320, supra.

However, though the information involved in this case is not property, a question remains as to whether the concealment of the information nevertheless deprived the insurance company of money or property. The answer depends, of course, on

what Rodolitz was entitled to under the insurance policy. And as we demonstrate in Point III, infra, nothing Rodolitz allegedly concealed could have had any effect on what the insurance company was obligated to pay him under the policy. Their obligation did not depend on any out-of-pocket costs, but entirely on the actual cash value of the property. Thus there was no potential for loss, since the insurance company would have to pay what they contracted to pay, regardless of how much Rodolitz expended for his repairs. United States v. Covino, 837 F.2d 65, 71 (2d Cir. 1988).

POINT III

THE COURT'S CHARGE ON THE APPLICABLE INSURANCE LAW AND POLICY COVERAGE PERMITTED THE PETITIONER TO BE CONVICTED ON AN INCORRECT THEORY OF LAW

In United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970), the Second Circuit held that a defendant who deceives, but does not intend to defraud, is not guilty of mail fraud. If no injury flows or is contemplated from the deception, there is no crime.

In the present case, the petitioner allegedly created a deception in documenting the repairs. But he defrauded no one. He did not intend to "rip off" the insurance company and collect more than he was entitled to. Of course, the government doesn't see it this way. So the principal question is: how much was Rodolitz entitled to recover under the insurance contract. If

he was asking only what he was entitled to, no amount of deception can create a fraud. If he was trying to get more than proper value, the conclusion will be otherwise.

In this trial, the way the case went to the jury allowed it to find a fraud where there was none by allowing them to assess proper value under an incorrect standard, and under a misapprehension as to how the insurance policy was to be read. (A copy of the insurance policy is in the appendix).

On the issue of what the petitioner was entitled to recover under the insurance policy, the court charged:

> "The government claims that...under the terms of the insurance policy, and under the law, he would only have been entitled to recover, whichever was less, his out of pocket costs, the replacement cost or the actual cash value of the loss" (tr. 1577).

This is incorrect. "Out of pocket costs" is not applicable in this case. It comes from an endorsement to the insurance

policy which was never invoked, and which could not legally be invoked under the circumstances here. Only the standard policy, without the endorsement, is applicable, and under the standard policy, Rodolitz was entitled to the lesser of actual cash value or replacement cost. Any use of sham companies or a circuitous route of documentation has no effect on either of these.

The insurance policy consists of two parts: the standard policy and the endorsement. Section 1 of the policy is captioned "Standard Form." The standard form insurance contract contains an express provision for recovery in the amount of the lesser of "actual cash value" or replacement cost of the property at the time of loss. The precise language of the "actual cash value" clause is statutorily mandated in New York. Section 3404(e) of the New York

Insurance Law provides for insurance against loss:

> "...to the extent of the actual cash value of the property at the time of a loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss."

The endorsement, for which Rodolitz paid an extra premium, has its own standards. It allows recovery for the smallest of a) the amount of the policy, b) replacement cost, or c) the amount actually and necessarily expended in repair or replacement. (Policy, para. 5). It also provides that the endorsement must be invoked in writing within 180 days after loss (para. 6).

The purpose of the endorsement is to provide extra coverage; that is, if the cost of repair exceeds coverage under the standard form. It is a protection for the insured, and that is why he must pay an

extra premium for it. It cannot be invoked unless the insured actually spends more out-of-pocket than actual cash value. In other words, if actual cash value under the standard policy is less than the actual cost of repair, the endorsement brings the coverage up to the higher figure. But out-of-pocket expenses must exceed actual cash value for the endorsement to apply. Kolls v. Aetna Casualty & Surety Co., 378 F.Supp. 392 (SD Io. 1974, aff'd 503 F.2d 569 (7th Cir. 1974); Higgins v. Insurance Co. of North America, 469 P.2d 766 (Or. Sup.Ct. 1970); Huggins v. Hanover Insurance Co., 423 So. 2d 147 (Ala. Sup.Ct. 1982); Diamond v. Insurance Co. of North America, 72 Cal.Rptr.2d 862 (C.A. 1968); State Farm Fire and Casualty v. Ponder, 469 So.2d 1262 (Sup.Ct. Ala. 1985).

Here, the endorsement was never invoked because out of pocket expenses did not

exceed the actual cash value or replacement cost under the standard form. The trial record shows this clearly. Harvey Guis, the government's insurance expert, testified that no proof of loss was ever filed (Tr. 217). The only demand for payment under the policy was the commencement of the law suit (Tr. 218-19), which did not refer to the endorsement (Tr. 360-1). Indeed, during the trial, the court discussed with counsel whether the endorsement applied. When no definitive answer was forthcoming, the court allowed evidence regarding recovery under the endorsement into the case "subject to connection" (Tr. 213-15). But it was never connected, and no where in the record is there one iota of proof showing the endorsement was invoked.

Yet the court's charge quoted above, is based on coverages listed in the endorsement, particularly "out of pocket"

expenses. Since the out-of-pocket expenses were smaller than the actual cash value or replacement cost, the endorsement could not even legally be invoked. Yet the jury was allowed to find that Rodolitz' "out of pocket" expenses - which were the subject of the deception - were less than what he claimed as actual cash value or replacement cost, and use that difference as a measure of fraud. For instance, the government contended that Rodolitz estimated the claim at $1.2 million, but received back $725,000 that he paid to Lawrence Roofing (Tr. 32). This leaves $475,000 as "out-of-pocket" expenses. In other words, the jury could have found that Rodolitz was entitled to only $475,000, yet was claiming $1.2 million. But under the standard form policy, he was entitled to actual cash value, $1.2 million, regardless of whether he spent $475,000 or 2 cents to fix the

roof. For under the law, he was entitled to convert his loss to cash and spend less money to repair the roof. In other words, if someone's house burns down, he is entitled to collect actual cash value or replacement cost for materials of like kind and quality. But if he then decides to rebuild a more modest or cheaper house, using some of the insurance proceeds while pocketing the rest, or if he decides not to repair it at all - that is perfectly legal and entirely within the rights of the insured. Foley v. Manufacturer's Fire Ins. Co., 152 NY 131, 135 (1897): Also see, Boskowitz v. Continental Insurance Co., 175 App. Div. 18 (1st Dept. 1916); Eshan Realty Corp.v. Stuyvesant Insurance Co. of New York, 12 A.D.2d 818 (2d Dept. 1961).

Indeed, as the court in State Farm & Casualty v. Ponder noted, it would be a "mockery" to suppose that someone who

receives $100,000 as actual cash value or replacement cost on a home fire, and spends only $50,000 to fix it, would then have to return the extra $50,000 to the insurance company. 469 So. 2d at 1266, supra.

If endorsement recovery does not apply, the next logical question is: what was Rodolitz entitled to under the standard policy? The policy says he was entitled to recover the lesser of actual cash value or replacement cost. But which was less? What was the proper value under the insurance policy? Strangely, the trial court's charge in effect withdrew this issue from the jury. The court charged that "you are not being asked to decide the actual cash value" (Tr. 1575, 1576). But if the jury could not decide actual cash value, how could they decide whether it was less or more than replacement cost? In other words, how could they decide how much Rodolitz was

entitled to under the insurance policy. To put it in the context of the criminal case, without determining whether actual cash value was more or less than replacement costs, it is impossible for a jury to tell whether Rodolitz was "ripping off" the insurance company or simply trying to get what he was entitled to.

Hence, under the charge given, the question of guilt or innocence cannot be properly addressed since it is not known whether the defendant was asking for more than he was entitled to. In fact, under the correct standard - which should have been charged explicitly - there was no gap between what Rodolitz asked for and what he was entitled to under the policy. Hence there was no fraud.

POINT IV

THE TAMPERING COUNT IS ALSO AFFECTED BECAUSE OF THE JURY'S ASSESSMENT OF PROPER VALUE UNDER THE WRONG STANDARD

The government contended that Rodolitz tampered with the witness Blutstein by misrepresenting "that he was only trying to get what he was entitled to get" from the insurance company (ct's. charge, Tr. 1586). In affirming the tampering count, the Court of Appeals discussed United States v. King, 762 F.2d 232 (2d Cir. 1985), decided after the trial but before the appeal, which held that if a defendant tries to persuade a witness to mislead the government, but in no way misleads the witness, the defendant has not violated 18 USC 1512. The Court observed, however, that Rodolitz told Blutstein that he had a large roof repair to do, that he had accumulated roofing supplies over the years, and that he needed Bolla

Supply to act as apparant seller in order to use the supplies "and get the proper value from the insurance company". 786 F.2d at 82, supra. The Second Circuit wrote that the jury could have concluded that in using the term "proper value", Rodolitz meant "the full insurance proceeds to which he was lawfully entitled." Since there was evidence at trial that this was false, the statement constituted misleading conduct punishable under the statute. ibid.

However, as was argued in Point III, supra, the jury was operating under an erroneous theory in assessing "proper value." They were, for instance, told they could consider out-of-pocket expenses under the endorsement as a measure of proper value, whereas the lesser of actual cash value or replacement cost was the true standard. In other words, the jury could have found a low proper value on an

out-of-pocket expense theory - the wrong standard - and then used that assesment to conclude that Rodolitz misled Blutstein. The guilty verdict would then follow. However, if they had used a correct actual cash value or replacement cost standard, they might have concluded that Rodolitz had not misrepresented to Blutstein what he was trying to do. The tampering count would then fall.

Moreover, since the jury was told they weren't being asked to decide actual cash value (tr. 1575-6), they couldn't determine whether it was more or less than replacement cost. Thus the jury couldn't even make a determination of proper value at all. They could not, therefore, conclude whether Rodolitz' statement to Blutstein was true or false.

In addition, the Second Circuit pointed to the deception itself as sufficient

evidence that Rodolitz was not trying to recover proper value for his work? The Second Circuit concluded that "if he sought only that to which he was legally entitled, no necessity existed for Rodolitz to hatch a fraudulent scheme." Because the scheme involved "sham bank accounts" and the transfer of funds among a number of business entities, "the jury had ample grounds to find that Rodolitz developed and participated in this scheme to succesfully recover more from the insurance company that he was lawfully due." 786 F.2d at 80, supra. In other words, where there is smoke, there's fire; or to put it another way: the deception itself proved the fraud. Yet this holding ignores United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970), where the court held that deception was not sufficient to prove fraud.

In any event, since the jury did not get to assess proper value under correct standards, they could not properly assess the truth or falsity of Rodolitz' statement to Blutstein that he was only trying to get what he was entitled to under the policy. Thus, the tampering count was infected just as much as the mail fraud conviction.

POINT V

THE OBJECTION TO THE COURT'S CHARGE ON NEW YORK INSURANCE LAW WAS PROPERLY PRESERVED

On the coram nobis appeal, the Second Circuit once again declined to reach the merits of the insurance law charge. This time the court said "Rodolitz did not object to the charge on this ground in the district court and did not attempt to make this argument on appeal from the conviction."

This is an unfair reading of the record. The question of how to deal with New York insurance law came up several times during the trial, and various theories were argued by the defense concerning issues of partial loss and depreciation in insurance law. After the court's charge, the prosecutor raised questions about the charge on actual cash value and out-of-pocket expenses (Tr. 1593-6). When it was time for

defense counsel to state any objections to the charge, the following ensued:

"MR. EVSEROFF: I have some exceptions, Judge. I respectfully except in its entirety to that portion of your Honor's charge dealing with a recitation of the applicable insurance law of the State of New York.

"THE COURT: You have your exception. I think that is the law in the State of New York as far as I can ascertain.

"MR. EVSEROFF: Just so the record is clear, you Honor, that portion of your Honor's charge dealing with the recitation...

"THE COURT: You have your exception to that.

"MR. EVSEROFF: Thank you.

"THE COURT: Lots of luck on that in the Court of Appeals."

(Tr. 1597-8).

Thus, defense counsel made a general objection to the charge on the applicable insurance law. When he tried to be even more specific about what portions of the insurance law charge he challenged, the court simply cut him off. Under these

circumstances, where the "defendant was not afforded the opportunity to explain his objection fully", his point is deemed preserved for review by the general exception. United States v. Bernal, 814 F.2d 175, 182-3 (5th Cir. 1987); Golden v. United States, 318 F.2d 357 (1st Cir. 1963). This is because the purpose of a specific exception under Rule 30 is to allow the court an opportunity to correct itself. When the court itself prevents a more specific exception, it announces "its desire to hear no more." The objection made thus "must be regarded as adequate." United States v. Bernal, ibid. Accordingly, there was no waiver, and the issue of the insurance law charge was preserved for review.

It is true that on direct appeal the insurance law theory raised by the defense was not the same insurance law theory that

was raised on the coram nobis petition. The explanation is that in this complex area of law, further study by counsel revealed more cogently how the instructions were in error. But surely an appellate court, reviewing a challenge to the insurance law charge on the merits, could consider a viewpoint not expressly stated by counsel. This is particularly so where the whole question of guilt or innocence rode on the way the case went to the jury. Indeed, it is ironic for the Second Circuit to do what it did here on the coram nobis appeal. That is, it threw another procedural roadblock into a case where the petitioner's hope was to finally gain his day in court on the merits.

POINT VI

CORAM NOBIS IS AN APPROPRIATE REMEDY IN THIS CASE

The Court of Appeals held that coram nobis should not be available in this case because there are no extraordinary circumstances requiring relief to achieve justice. We believe this is a mistaken view, because there is no other way but coram nobis for the petitioner to apply the McNally holding and obtain his day in court on the merits of his case.

First, denial of appellate rights are properly remediable by collateral attack. e.g. Rodriguez v. United States, 395 U.S. 327 (1969). Second, McNally has been held retroactive to cases, such as this one, where the appeal was decided before McNally was handed down. Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988).

Moreover, where the sentence has been served, as is the case here, coram nobis is the appropriate vehicle to test the conviction. United States v. Morgan, 346 US 502 (1954); United States v. Loschiavo, 531 F.2d 659, 662 (2d Cir. 1976); United States v. Travers, 514 F.2d 1171 (2d Cir. 1974). Indeed, whatever general constraints there are in applying the "extraordinary" writ of coram nobis, coram nobis is the specifically approved means for raising a retroactive McNally claim where the sentence has already been served. United States v. Mandel, 862 F.2d 1067, 1074 (4th Cir. 1988), aff'ing 672 F.Supp.864 (D.Md. 1987).

Underlying the use of coram nobis in these circumstances is the recognition "that if this case were before us on direct appeal we would be required to overturn all the convictions." United States v. Mandel, 862 F.2d at 1074, supra. In Dalton v. United

States, 862 F.2d 1307 (8th Cir. 1988), the Eighth Circuit analyzed the applicability of habeas corpus to McNally in a similar way. "If this case were before us on direct appeal of Dalton's conviction, the error in the jury instruction would require reversal unless the government could show that the instructional error was harmless beyond a reasonable doubt." 862 F.2d at 1309.

Obviously, if an appellate court feels there would not be a reversal on direct appeal, then neither coram nobis or anything else would be a remedy. However, if it would reverse were the case before it on direct appeal, then some remedy should be appropriate. Initially, we tried the direct approach by petitioning for recall of the mandate and a rehearing, a procedure possible - though unusual - to apply a subsequent Supreme Court decision. See, e.g. United States v. DiLapi, 651 F.2d 140,

144 (2d Cir;. 1981); Legate v. Maloney, 348 F.2d 164 (1st Cir. 1965). However, that motion was denied without opinion. Therefore, because the sentence has been served, coram nobis was the only remaining mechanism to bring this case back to the Court of Appeals. And, after all, our argument was that the McNally "flaw" appeared primarily in the Second Circuit's opinion upholding the conviction. We were merely trying to get the Court of Appeals to review the conviction as if McNally - a retroactive case - had been the law when the appeal was first entertained. And while United States v. Stoneman, 870 F.2d 102 (3d Cir. 1989) and United States v. Keane, 852 F.2d 199 (7th Cir. 1988), cases cited by the government, suggest that some further inquiry will have to be made into issues of harmless error or into whether the error was in some way "fundamental" enough to allow

collateral relief, this case satisfies any such requirements.

In this regard, the government argued that Rodolitz was guilty, and thus there can be no fundamental miscarriage of justice in this case by refusing to review it on the merits. But the whole point of Rodolitz' defense and appeal was that he is not guilty. He never asked for more than he was entitled to under the insurance contract. When the court's charge took away from the jury the vital question of what the insurance company legally owed him, it also took away from the jury the question of whether Rodolitz was overreaching in his insurance claim. Thus, the failure of the charge went to the heart of the question of whether any fraud could have been committed. And whether or not the defendant committed any crime is clearly a fundamental issue,

involving whether or not a miscarriage of justice has taken place.

The same reasoning applies to the obstruction count. For the question of "proper value" was essentially withdrawn from the jury. Without a determination of proper value, there could be no determination of whether Rodolitz' statements to Blutstein were true or false. (pt.IV, supra). Again, whether any crime was committed is the issue at stake; a fundamental question in a criminal case.

Finally, the Court of Appeals remarked that coram nobis relief is "the practical equivalent of an acquittal". From the point of view of the petitioner, who has already served a 2-year sentence in prison, "acquittal" is no longer the appropriate word for any possible result, no matter how favorable.

CONCLUSION

THE WRIT OF CERTIORARI
SHOULD BE GRANTED

Respectfully submitted,

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603-746-4023

Attorney for Petitioner

Of Counsel

Lawrence A. Berger

APPENDIX A — OPINION OF THE COURT OF APPEALS ON CORAM NOBIS, 2/4/91

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 90-6225

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February one thousand nine hundred and ninety-one.

Present:

HONORABLE AMALYA L. KEARSE,

HONORABLE GEORGE C. PRATT,

HONORABLE JOSEPH M. McCLAUGHLIN,

Circuit Judges,

ABRAHAM RODOLITZ,

Petitioner-Appellant,

-v-

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appendix A

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

Petitioner Abraham Rodolitz, having been convicted of, and having served his sentence for, mail fraud in violation of 18 U.S.C. § 1341 and witness tampering in violation of 18 U.S.C. § 1512(a), appeals from an order of the United States District Court for the Southern District of New York, John E. Sprizzo, *Judge*, dismissing his petition for a writ of coram nobis vacating his convictions on the ground that the decision of the United States Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987) ("*McNally*"), undermined the rationale of this Court in affirming his convictions, *see United States v. Rodolitz*, 786 F.2d 77 (2d Cir.), *cert. denied*, 479 U.S. 826 (1986). Rodolitz pursues this contention on appeal. For the reasons below, we reject his arguments and affirm the order of the district court.

Coram nobis relief, which is "the practical equivalent of an acquittal, "*United States v. Keogh*, 440 F.2d 737, 741 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971), is available only in extraordinary circumstances showing that such relief is needed to achieve justice. *See, e.g., United States v. Morgan*, 346 U.S. 502, 511 (1954); *United States v. Loschiavo*, 531 F.2d 659, 662 (2d Cir. 1976). No such circumstances have been shown here.

Appendix A

The instructions of the trial court to the jury were not flawed under *McNally*. The jury was not instructed that it could find Rodolitz guilty of mail fraud on the basis of the type of intangible nonproperty deprivation found improper in *McNally*. Nor was the theory of the prosecution inappropriate. Prosecution for use of the mails in furtherance of a scheme to inflate a claim for insurance is plainly proper under *McNally*.

We decline to consider Rodolitz's argument that one aspect of the trial court's instructions was erroneous under New York insurance law. Rodolitz did not object to the charge on this ground in the district court and did not attempt to make this argument on appeal from his conviction. Since it cannot be said that the instruction was "plain error," *see* Fed. R. Crim. P. 52(b), or that exceptional circumstances excused Rodolitz's failure to raise the question on direct appeal, *cf. Natarelli v. United States*, 516 F.2d 149, 152 n.4 (2d Cir. 1975) (exceptional circumstances are required to warrant habeas review of argument not made on direct appeal); *United States v. Keogh*, 440 F.2d at 741 (standards for issuance of coram nobis relief are even more stringent than those for habeas relief), Rodolitz's present argument is not properly before us.

We have considered all of Rodolitz's properly preserved arguments on this appeal and have found them to be without merit.

The order dismissing the petition is affirmed.

Amalya L. Kearse
AMALYA L. KEARSE, U.S.C.J.

George C. Pratt
GEORGE C. PRATT, U.S.C.J.

Appendix A

Joseph M. McLaughlin
JOSEPH M. MCLAUGHLIN,
U.S.C.J.

N.B. This summary order shall not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B - OPINION OF DISTRICT COURT ON CORAM NOBIS, 7/5/90

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S89 Civ. 1935 JES

ABRAHAM RODOLITZ,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CORAM NOBIS DECISION

June 22, 1990
4:30 p.m.

Before:

HON. JOHN E. SPRIZZO

District Judge

APPEARANCES

ALAN SCRIBNER
Attorney for plaintiff

Appendix B

OTTO G. OBERMAIER
United States Attorney for the
Southern District of New York

JOHN T. McCORMICK
Assistant United States Attorney

THE COURT: This is a 1651 coram nobis motion to vacate a conviction principally upon the ground that the court's instructions in this case improperly allowed the jury to convict on the basis of an intangible property right in violation of the Supreme Court's decision in McNally. Suffice it to say, as the government's brief quite adequately points out, that the court's charge, read as a whole, did not permit the jury to convict on the basis of any intangible rights.

The case was tried upon the theory of a fraud committed upon the insurance company by submitting false and sham documentation to the insurance company in connection with an insurance claim. Quite aside from that, I think it is very clear, from McNally and the Second Circuit court cases that followed it, that McNally does not outlaw all theories of mail fraud based upon intangible rights. Whether rights be tangible or intangible, the principal focus under McNally is whether or not they have pecuniary or property value.

An insurance company's right to conduct an investigation into an insurance claim and not be subject to sham documentation in connection with that claim is a commercial right, even if intangible, having pecuniary value. Therefore, a scheme which involved the kind of sham documentation this record showed would certainly be a mail fraud within the mail fraud statute and

nothing in McNally therefore requires that this conviction be overturned.

Furthermore, as the government quite correctly points out, the court's charge made it very clear in other portions of the charge that to be convicted in this case defendant would have to have schemed to defraud the insurance company of something of pecuniary value.

Given the status of the law that existed then, there is no basis to set aside this conviction based upon McNally.

With respect to the other issues raised, before reaching even the merits of the issue that the court's instructions with respect to the insurance law were in some way erroneous or inadequate, suffice it to say these were issues that could have been and should have been raised on direct appeal. As counsel has indicated in the oral argument, one of them was raised on direct appeal. The Second Circuit, for it own reasons, chose not to reach it. That doesn't give me the right to hear it again on coram nobis. It is clear that issues that were raised or could have been raised on direct appeal are not properly subject to being reviewed by mean of coram nobis.

In any event, I think the government's papers are quite correct in pointing out that the court's charges with respect to the insurance law in the context of the manner and theory upon which the case was tried were not erroneous, and even were they properly raisable in this coram nobis application, those instructions would not be the basis for any relief.

What I have said with respect to the mail fraud claim, of course, a fortiori requires rejection of the argument that somehow

the obstruction charge was impacted by the court's erroneous instructions because that argument rests entirely upon the argument that the court's instructions with respect to the insurance law were in some respects erroneous or inadequate.

For all of the reasons set forth above, the petition for coram nobis is dismissed and I will enter an order of the court accordingly.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ABRAHAM RODOLITZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

89 Civ. 1935 (JES)
ORDER

All counsel in the above-captioned action having appeared before the Court at Oral Argument on June 22, 1990, and the Court having considered all matters raised at that Argument and in all papers submitted to the Court, it is

ORDERED that for the reasons expressed by the Court on the record the petition for a Writ of Error *Coram Nobis* be and hereby is dismissed; and it is further

ORDERED that the Clerk of Court is directed to close the above-captioned action.

Dated: New York, New York
July 5, 1990

s/ John E. Sprizzo
John E. Sprizzo
United States District Judge

APPENDIX C — OPINION OF THE COURT OF APPEALS ON DIRECT APPEAL, 3/17/86

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1448 August Term, 1985

Argued August 13, 1985 Decided March 17, 1986

Docket No. 85-1112

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ABRAHAM J. RODOLITZ,
Defendant-Appellant.

Before: NEWMAN and WINTER, *Circuit Judges* and COFFRIN, *Chief District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, after a jury trial before John E. Sprizzo, *Judge*, convicting defendant of three counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of tampering with a witness in violation of 18 U.S.C. § 1512.

Affirmed.

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* Of the United States District Court for the District of Vermont, sitting by designation.

Appendix C

Richard A. Stanley, Special Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Stuart E. Abrams, Assistant United States Attorney, on the brief), *for Appellee.*

Jeffrey A. Rabin, Brooklyn, New York, *for Appellant.*

COFFRIN, *District Judge:*

Defendant Abraham J. Rodolitz appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York (John E. Sprizzo, Judge) on March 27, 1985. The jury convicted Rodolitz of three counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of tampering with a witness in violation of 18 U.S.C. § 1512. The case arises out of defendant's allegedly fraudulent scheme to conceal from the Massachusetts Bay Insurance Company his involvement in the repair of a damaged roof on one of his own buildings. In addition, the defendant allegedly attempted to persuade a witness to lie before a federal grand jury. On appeal, Rodolitz contends, *inter alia*, that the government presented insufficient evidence to establish either mail fraud or tampering with a witness. He also alleges that assorted trial defects constitute reversible error. For the reasons stated below, we affirm both convictions.

I. BACKGROUND

In late 1976, a windstorm damaged the roof of a commercial building owned by Oak Point Industrial Park, Inc. ("Oak Point").

Rodolitz owned Oak Point and, through the Massachusetts Bay Insurance Company, had insured the building against damage.

After the building was damaged, Rodolitz initiated a fraudulent plan designed to inflate the recovery of the claim against the insurance company. To accomplish this, either Rodolitz or one of his associates set up bank accounts in the name of one of several business entities. These businesses include Bolla Supply Company ("Bolla Supply"), Lawrence Roofing and Sheet Metal Company ("Lawrence Roofing"), and Tubular Products Manufacturing Company. Rodolitz also maintained an account in the name of Zeroy Industrial and Distribution Corporation ("Zeroy") which became active in this plan. Rodolitz, himself or through his associates, transferred funds between these corporations in an effort to create an appearance of legitimate transactions in roofing supplies and services between the businesses. According to the documents evincing the purported transactions, Rodolitz hired Lawrence Roofing and Zeroy to repair the roof on the Oak Point building. Lawrence Roofing and Zeroy then purportedly purchased from Bolla Supply the supplies necessary to perform the job. In fact, Rodolitz owned or controlled all the businesses and merely transferred money, materials and services between different branches of those businesses to give the illusion of arm's length transactions.

After using this method to establish a paper trail, Rodolitz filed a claim with the Massachusetts Bay Insurance Company for the $1,248,000 he asserts he expended in repairing the roof. He did not, however, reveal his connection to the companies purportedly involved in the repair. After the insurance company declined to pay the claimed amount, Oak Point sued the company in a New York state court and received a jury verdict of $1,226,241.39.[1] At no point, however, did Rodolitz reveal to the

jury in that case that all money expended on the repair eventually returned to him.

During the course of the civil suit against the insurance company, Rodolitz caused the mails to be used on three separate occasions to further his attempt to recover the $1,248,000 from the insurance company.

After Rodolitz learned that a federal grand jury was investigating his activities in connection with his claim under the insurance policy, he attempted to persuade one Seymour Blutstein to lie in certain significant respects about Bolla Supply. At Rodolitz's request, Blutstein had fronted for Bolla Supply. He opened a bank account indicating through the Certificate of Doing Business that he was engaged in dealing in building material and supplies under that trade name. He deposited checks furnished by Rodolitz in the account and made withdrawals, as Rodolitz directed, to other payee business entities created by Rodolitz. Blutstein, granted immunity by the government, eventually refused to tell the story which Rodolitz had requested even though initially he had advised Rodolitz he would do so.

II. DISCUSSION

Rodolitz claims on appeal that the government offered insufficient evidence as a matter of law to convict him of mail fraud in violation or 18 U.S.C. § 1341 or of witness tampering in violation of 18 U.S.C. § 1512. It is well established that the reviewing court must sustain the jury verdict in a criminal case if, "viewing the evidence in the light most favorable to the Government, any rational trier of facts could have found the defendant guilty beyond a reasonable doubt." *United States v. LeRoy,* 687 F.2d 610, 616 (2d Cir. 1982) (*citing Jackson v. Virginia,* 443 U.S. 307 (1979)), *cert. denied,* 459 U.S. 1174 (1983).

Defendant, therefore, bears a very heavy burden. *United States v. Carson*, 702 F.2d 351, 361 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983).

We find that the defendant clearly failed to meet his heavy burden with regard to the three mail fraud convictions. The government presented ample evidence from which a jury could find beyond a reasonable doubt that defendant conducted a scheme to defraud and the use of the mails in furtherance thereof. Although a closer question, we also find that the record provides sufficient evidence for a jury to find, beyond a reasonable doubt, defendant guilty of tampering with a witness.

A. Mail Fraud

To establish mail fraud, the government "must show that the defendant (1) participated in a scheme to defraud; and (2) knowingly used the mails to further the scheme." *United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.), *cert. denied*, 464 U.S. 853 (1983). *See United States v. Corey*, 566 F.2d 429, 430 n.2 (2d Cir. 1977); *United States v. Cyphers*, 556 F.2d 630, 632 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977). In addition, "[p]roof of a fraudulent scheme requires evidence showing a specific intent to defraud." *Gelb*, 700 F.2d at 879. *See also, United States v. Bronstone*, 658 F.2d 920, 927 (2d Cir. 1981) ("to make out a mail fraud violation, the Government must show that the scheme was devised with the specific intent to defraud, . . . that the use of the mails in furtherance of the scheme was reasonably foreseeable, . . . that . . . any nondisclosures or affirmative misrepresentations must have been material, . . . [and] that some actual harm or injury was at least contemplated . . .") (citations omitted), *cert. denied*, 456 U.S. 915 (1982). *But see United States v. Newman*, 664 F.2d 12, 20 (2d Cir. 1981) (not required that

government prove contemplation of harm in mail fraud case based upon breach of fiduciary duty by a private employee), *cert. denied*, 464 U.S. 863 (1983).

Evidence that the mails were used in furthering Rodolitz's insurance claim is uncontroverted. Rodolitz, however, claims that the government provided no proof that he acted with an intent to defraud or harm the insurance company or that his activities constituted a fraudulent scheme. He contends that he received only what he was due under the insurance policy, to wit, the actual value of the loss sustained in the windstorm. He urges that any recovery he may have been awarded in excess of the actual value of the loss was due to a good faith error in estimation of the cost of the repair. Rodolitz contends that because he got only that to which he was entitled under the policy, it is of no moment legally that circuitous or deceptive means were employed relative to the manner and cost of repair. For two reasons, we find appellant's argument completely without merit.

First, he argues that he received only that to which he was lawfully entitled under the Massachusetts Bay policy. That policy provides that recovery for damages be limited to the *smallest* of (1) the $3.8 million policy limit, (2) the replacement cost of the property intended for the same use, or (3) the amount actually and necessarily expended in repairing the property. If he sought only that to which he was legally entitled, no necessity existed for Rodolitz to hatch a fraudulent scheme. The evidence shows that Rodolitz opened and used sham bank accounts for a number of business entities. By transferring funds between these accounts, he created an appearance of "arm's length"[2] purchases of materials, some or most of which, according to Blutstein's testimony, Rodolitz already owned. Obviously under such an arrangement Rodolitz was in a position to "purchase" his own

materials to repair the roof at whatever price he chose to invoice them to one of his own companies. Based on this evidence, the jury had ample grounds to find that Rodolitz developed and participated in this scheme to successfully recover more from the insurance company than he was lawfully due.

Second, and more importantly, it was not necessary for the government to prove that Rodolitz recovered more from the insurance company than that to which he was entitled. To sustain the conviction, the government needed to prove only that Rodolitz employed a deceptive scheme intending to prevent the insurer from determining for itself fair value of recovery. *See United States v. Gelb*, 700 F.2d 875, 879-80 (2d Cird.), *cert. denied*, 464 U.S. 853 (1983); *United States v. Barta*, 635 F.2d 999, 1005 n.14 (2d Cir. 1980); *United States v. Adjmi*, 346 F.2d 654 (2d Cir. 1965).

The evidence of the scheme was overwhelming. Rodolitz used sham business entities and several bank accounts to conceal his direct involvement with all aspects of the roof repair. In fact, he admitted to using circuitous and deceptive means in calculating the cost and manner of repair. Thereafter, it was a virtually inescapable conclusion that Rodolitz intended to defraud the insurance company by preventing the company (and the state court jury) from determining, on the basis of accurate data, how much Rodolitz was entitled to recover. There was ample evidence upon which the jury could have found the defendant guilty beyond a reasonable doubt of mail fraud and we affirm the three mail fraud convictions.

B. Tampering with a Witness

Rodolitz also alleges insufficient evidence as a matter of law to convict him of tampering with a witness. Section 1512 of 18

Appendix C

U.S.C. provides in pertinent part that: "whoever knowingly . . . engages in misleading conduct toward another person, with intent to . . . influence the testimony of any person in an official proceeding . . ." shall violate the statute. It is undisputed that Rodolitz urged Blutstein to tell a false story to the grand jury about Bolla Supply. This story revolved around Bob Smith, a business associate of Blutstein, who had recently died. Rodolitz suggested to Blutstein that they say Smith had been the manager of Bolla Supply. To flesh out the story, Rodolitz suggested that he and Blutstein maintain that Rodolitz had given Smith building supplies to sell on consignment through Bolla Supply and that subsequently Rodolitz needed the supplies. As a result, Rodolitz purchased the supplies from Smith, according to the story, allowing Smith to realize a modest profit on the transaction. Rodolitz told Blutstein they needed to tell this story to allow Rodolitz to get the proper value for the roofing supplies from the insurance company.

Relying on *United States v. King*, 762 F.2d 232 (2d Cir. 1985), Rodolitz asserts there can be no misleading conduct when a witness is asked to tell a story the witness knows is false. *King* held that if a defendant simply tries to persuade a witness to mislead the government, but in no way misleads the witness the defendant has not violated section 1512. *Id.* at 237. *See United States v. Beatty*, 587 F. Supp. 1325, 1331-33 (E.D.N.Y. 1984) (the legislative history of section 1512 demonstrates that the section does not proscribe conduct that, without being misleading or threatening, induces others to lie to federal law enforcement officials; Congress included such a proscription in an earlier version of the legislation, but that version was deleted before final enactment). In *King* the defendant attempted to convince a witness to lie before a grand jury by telling a story that both the witness and the defendant knew was false. Furthermore the witness was aware of the true

purpose for the fabrication, namely, to exculpate the defendant.[1]

The government, however, distinguishes *King* from the case at bar. The government contends that in the instant case Rodolitz not only asked Blutstein to tell a story they both knew was false, but also made a false statement to convince Blutstein to tell the fabricated story. Based on this reasoning, the court agrees with the government that *King* is not controlling.

Section 1515(3)(A) of 18 United States Code defines misleading conduct for purposes of section 1512 as "knowingly making a false statement." 18 U.S.C. § 1515(3)(A). The most obvious example of a section 1512 violation may be the situation where a defendant tells a potential witness a false story as if the story were true, intending that the witness believe the story and testify to it before the grand jury. In contrast, in the instant case, defendant made false statements to convince Blutstein to lie to the grand jury. Although different in context and purpose, both situations involve the making of false statements, and therefore, according to section 1515, both involve misleading conduct under section 1512. In giving the statutory language its fair meaning, the court must find that making false statements to convince another to lie falls squarely within the definition of "engaging in misleading conduct toward another person" under section 1512.

In this case, if the jury could fairly and logically have found the statment made by Rodolitz to Blutstein to have been false, then the making of such statement would constitute misleading conduct under the statute. Accordingly we must determine (1) whether the government offered sufficient evidence that Rodolitz made false statements to Blutstein and (2) whether the jury could reasonably conclude that Rodolitz made the statements with the intent to influence Blutstein's testimony before the grand jury.

Appendix C

At trial, Blutstein testified about a statement that Rodolitz made to him. The government claims that by making this statement, Rodolitz violated section 1512. Blutstein related Rodolitz's statement as follows:

> He told me he had a large roof repair to do and that he had roofing supplies he had accumulated over the years in storage, over all the years he was in the construction business, and that he needed Bolla Supply to act as the . . . apparent seller of the supplies to the company doing the roofing . . . [i]n order to use the supplies and get the proper value . . . from the insurance company.

According to the evidence at trial, the truth or falsity of this statement hinges on Rodolitz's meaning of "proper value." In the context used, the statement is open to a number of interpretations. In assessing the evidence, however, the court must view it most favorably to the government, and construe all permissible inferences in the government's favor. Based on these standards, the court finds that the jury could fairly and logically have concluded that in using the term "proper value," Rodolitz meant "the full insurance proceeds to which he was lawfully entitled." The evidence introduced at trial demonstrates such a statement to be clearly false. Therefore, the jury had ample evidence upon which to find that defendants's statement constituted misleading conduct.

We now turn to whether there was sufficient evidence for the jury to conclude that Rodolitz made the false statement with intent to influence Blutstein's testimony. In its brief, the government indicates that Rodolitz told Blutstein this version of the "truth" when Blutstein asked why they simply did not tell

the truth. At trial, however, Blutstein merely testified that this statement described the truth as told to him by Rodolitz. Blutstein made no representation as to when Rodolitz so stated. Regardless of the circumstances under which Rodolitz made the statement, however, we find that the jury "fairly and logically" could have concluded that Rodolitz's purpose in so doing was to persuade Blutstein that lying was justified. *Carson*, 702 F.2d at 361. *See Glasser v. United States*, 315 U.S. 60, 80 (1942).

In sum, the court finds that using misrepresentation to convince someone to lie to a grand jury falls squarely within the prohibitions of section 1512. In addition, the government presented sufficient evidence upon which the jury could have concluded that Rodolitz engaged in misleading conduct toward Blutstein in an effort to influence Blutstein's testimony before the grand jury. Therefore, the court finds that defendant failed to meet the heavy burden the law imposes on him in his claim that the government failed to introduce sufficient evidence to sustain his conviction.

C. Other Points of Appeal

Appellant argues other points of error by the trial court. Most notably, appellant contends that the court incorrectly instructed the jury with regard to New York insurance law with respect to damages as it pertains to the mail fraud counts. Because we find the fraud required for mail fraud inherent in the circuitous and deceptive means of substantiating the insurance claim, rather than simply in the amount recovered, defendant was not prejudiced by the court's charge with respect to damages recoverable under the insurance policy in the state court proceeding and we do not reach the validity of the court's instruction in that regard.

We have considered appellant's other alleged points of error

and find them without merit.

CONCLUSION

We affirm the district court's convictions for three counts under 18 U.S.C. § 1341(a), and one count under 18 U.S.C. § 1512(a)(1).

Appendix C

FOOTNOTES

1. The trial judge set aside the jury's findings that Rodolitz expended $1,226,241.39 in repairing the roof. Both parties took an appeal from the order which is presently pending.

2. In his brief on appeal, counsel for the defendant stated that the circuitous nature of the purchases may have created the impression of an arm's length transaction. Appellant's Brief at 31.

3. The story which defendant King sought to have the witness tell the grand jury was that King's brother, rather than King himself, was implicated in a counterfeiting scheme which the grand jury was considering. *King,* 762 F.2d at 236-37.